IN THE SUPREME COURT OF BELIZE, A.D. 2002

ACTION NO. 208

IN THE MATTER **of Constitutional Redress under section 20 and for breach of sections 9, 14 and 17 of the Belize Constitution**

AND

IN THE MATTER **of an Application by JITENDRA CHAWLA (aka JACK CHARLES) doing business as XTRA HOUSE**

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Dean Barrow S.C. for the Applicant.
Mr. Elson Kaseke, Solicitor General, with Ms. Minnet Hafiz, for the Respondent.

JUDGMENT

This is an application by Notice of Originating Motion dated 2nd May 2002 by Jitendra Chawla, a.k.a. Jack Charles, for redress pursuant to section 20(1) of the Belize Constitution and Rule 3(1) of the Supreme Court (Constitutional Redress and Reference) Rules and the inherent jurisdiction of this for the following Declarations, Orders and relief:

> *"(1) A Declaration that the constitutional rights of the Applicant under Sections 9, 14 and 17 of the Belize Constitution have been contravened by the Comptroller of Customs/Government of Belize in consequence of the wrongful collection and retention of excess duty and an excess deposit with respect to goods imported by the Applicant; and in the consequence of the unlawful search and seizure of the Applicant's premises on April 10th, 2002, invasion of his privacy and illegal detention of his property viz 12 computers and 33 sacks of rice.*

(2) *An Order that the Comptroller of Customs give back the sum of $36,529.55 (BZE) together with commercial interest from 17th July 2001 which he wrongfully collected and retained from the Applicant as a deposit (on a Provisional Entry in respect of goods being imported) over and above the duties that had been estimated by the said Comptroller at $53,470.45.*

(3) *An Order that the Comptroller of Customs give back to the Applicant the sum of $24,250.00 together with commercial interest from August 30th, 2001, as being money wrongfully collected and retained as uplifted duties on goods imported by the Applicant, despite the Applicant's proof that the correct duty on the said goods was in fact $29,220.45.*

(4) *An Order that the Comptroller of Customs give back to the Applicant 12 computer systems and 33 sacks of rice, which he wrongfully seized and detained on April 10th, 2002.*

(5) *An Order that the Comptroller of Customs/Government of Belize pay damages to the Applicant for the breach of the Applicant's constitutional rights and for loss and damage suffered (by a business transaction cancelled) in consequence of, in particular, the seizure and detention of the Applicant's computer systems.*

(6) *Such further and other relief as the court deems just."*

2. The grounds stated by the Applicant for his application are as follows:

"1. On the 17th July 2002, the Comptroller of Customs required a deposit of $90,000.00 in respect of a Provisional Entry passed by the Applicant pertaining to goods the Applicant imported. The Comptroller at the time estimated the duty on the goods at $53,470.45, but wrongfully and in breach of the Applicant's constitutional rights, obliged the Applicant to deposit $90,000.00 rather than the said $53,470.45 in order for him to release the goods and await an Adjusting Entry, and thus illegally deprived the Applicant of $36,529.55.

2. *On August 30th of 2001, the Applicant passed an Adjusting Entry to perfect the Provisional Entry referred to in Ground 1. The Comptroller of Customs, notwithstanding proof of the values submitted by the Applicant in his Adjusting Entry, wrongfully insisted on collecting duty in the amount of $53,470.45, rather than $49,220.45, thus illegally depriving the Applicant of $24,250.00.*

3. *The Comptroller of Customs, via his agents and servants in the Customs Department, wrongfully entered and searched the Applicant's premises twice on April 10th, 2002, and illegally seized, carried away and thereafter detained 12 computer systems and 33 bags of rice on which customs duties had already been paid and which were lawfully in the custody of the Applicant."*

3. In support of his application the Applicant filed an affidavit sworn to on 30th April 2002 and filed on 2nd May 2002.

4. In opposition to the application, Mr. Everard Lopez, acting Comptroller of Customs; Mr. Colin Griffith, Senior Customs Officer; Mr. Victor Recinos, a Collector of Customs in charge of Customs Investigations Section called the Customs Enforcement Unit; Mr. Angel Cocom, Senior Customs Examiner; and Mr. Pete Castillo, Assistant Customs Systems Administrator, all swore affidavits dated 24 May 2002 and filed the same day.

5. The Director of Public Prosecutions also swore to an affidavit dated 29th May 2002 and filed the same day when the hearing of this application was well under way. I can say at the outset that the averments in this affidavit will turn on what is the outcome of one of the principal issues for determination in this application.

6. The applicant also filed a further affidavit dated 29th May 2002 in answer to the affidavits of Pete Castillo, Angel Cocom and Victor Recinos referred to earlier.

7. The following facts could be gleamed from the several affidavits which have given rise to this application. The applicant is a businessman doing business as Xtra House, a supermarket situated in Cemetery Road, Belize City. Sometime in July 2001, the applicant imported sundry goods for his supermarket. There was some divergence between him and the Customs

authorities as to the actual Customs duties exigible on his imports. The applicant's own customs entry showed that a total duty of **$29,629.32** was payable. In order to clear the goods, a Provisional Entry was approved for the applicant, but for this he was required to deposit the sum of **$90,000.00**, which he did. On a final assessment of the duties payable, the sum of **$54,477.41** was arrived at by the Customs authorities. I must mention that the applicant gives the sum of **$53,470.45**, as the sum Customs insisted on collecting from him as the duties payable. Nothing much turns on this variation between the two sums, that is the sum of **$54,477.41** the Customs said was the total amount of duties payable by the applicant, and the sum of **$53,570.45**, the applicant said the Customs stated was the final duty payable. The real bone of contention is the deposit of **$90,000.00** required of the applicant and which he had to pay in order to clear his goods on the provisional entry. From this sum the final duty, whether the sum of **$53,570.45** as stated by the applicant or the sum of **$54,477.41** as deposed to by the Customs authorities (see paragraph 8 of the affidavit of Everard Lopez, the acting Comptroller of Customs), was eventually deducted. It is the balance of the **$90,000.00** deposit that the applicant contends was unlawfully taken from him as it constitutes an excess deposit and therefore an unconstitutional taking of his property. The applicant also contends that notwithstanding proof of the values of his imports submitted by him, the Customs authorities insisted on collecting duty as assessed by them, thereby depriving him of the extra sum he had to pay, which was deducted from the **$90,000.00** deposit he was required to pay.

8. Mr. Everard Lopez, the Acting Comptroller of Customs deposes in his affidavit, among other things, as follows:

> *"1. On or about 17th July 2001, the Invoice Section forwarded to me Customs Entry with Registration No. R09686 dated 10th July, 2001 which showed a total duty of $29,629.32. This is now shown to me and marked "E. L. 1".*
>
> *2. On the said date Mr. Colin Griffith, Senior Customs Officer indicated to me that the Applicant had to pay approximately $28,000.00 additional duties.*

3. *On the said date, the Applicant informed me that he needed his goods and I informed him that for the goods to be released he had to pay a deposit of twice the estimated duties. I requested that he pay $90,000.00 as a deposit and that upon providing further proof of value of the goods we would give him a refund.*

4. *That by section 24 of the Customs Regulation Act Chapter 49 I have the authority to request any Declarant to make a Deposit of a sum of money sufficient in amount to cover the estimated duties payable and additional duties not being less than the amount deposited as the estimated duties.*

5. *On 17th July, 2001 the Applicant made a Provisional Entry for the sum of $90,000.00. The said Entry is now shown to me and marked "E. L. 2".*

7. *On 4th December, 2001 the Invoice Section delivered to the Declarant Miguel Torres two Assessment Notices for the duties payable. Assessment A 22405 for a total of $30,226.78 being the provisional duty on Entry No. R 14569 and Assessment A 22406 for a total of $24,250.63 being the additional duties. The total amount of Duties payable amounting to $54,477.41. Copies of the said Assessment notices are now shown to me and marked "E. L. 4" and "E. L. 5"."*

9. Also, in April 2002, the applicant imported some goods, this time twelve computers with some other goods. There is some conflict in the affidavits of the Applicant (paragraphs 6 and 7 of his affidavit of 30th April 2002) and the affidavit filed on behalf of the Customs authorities (paragraphs 2, 3, 4, 5, 6, 8, 9 and 10 of the affidavit of Victor Recinos, a Customs Collector in charge of the Customs Investigations Sections), as to what really happened on the entry and clearance by the applicant of these goods. What is agreed and undisputed is that there was an uplift or an increase in the duty payable by the Applicant for the computers, and he duly cleared them.

10. Sometime during 10th April 2002 the Applicant was paid a visit by officers from the Customs Department who, the with aid of a Writ of Assistance, proceeded to search his premises. This came about because of an

alleged discrepancy in the Customs Declaration Form in respect of the computers which was discovered during an audit in the Customs. During the search the Customs officers took away the twelve computers the Applicant had earlier cleared together with some forty-nine sacks of rice which they alleged had not been processed through Customs. The Applicant managed to produce an invoice in respect of "16 basmati rice", and sixteen of the sacks were returned to him, but the rest, thirty-three sacks, were together with the twelve computers, taken away. Both Mr. Angel Cocom, Senior Customs Examiner, Investigation Section and Mr. Victor Recinos, a Collector of Customs who is in charge of the Investigations Section called the Enforcement unit deposed to the use of the Writ of Assistance through which entry was gained to the Applicant's premise. They both exhibited a copy each of this Writ of Assistance to their affidavits. Mr. Cocom for example in **paragraph 2** of his affidavit said, ***inter alia***:

> *"2. At approximately 2:45 p.m. I was the officer-in-charge of Mr. Pete Castillo, Assistant Customs Systems Administrator, and we visited the Applicant's business premises Xtra House, Belize City, and I requested to see the Applicant, who shortly came forward to see me after one of his employees had contacted him via telephone. I informed the Applicant of the purpose of our visit, and also read out the Writ of Assistance which was in my possession . . ."*

He then continued at **paragraph 5** as follows:

> *"5. When we arrived at Xtra House, Mr. Recinos inquired about the Applicant, whereafter the Applicant arrived. He was shown the Writ of Assistance but said that it was not necessary to read it to him because he knew its contents from my earlier visit. Applicant was informed in my presence by Mr. Recinos that we were requesting permission to search his premises for the twelve computers sets and he agreed."*

Mr. Recinos at paragraph 14 of his affidavit deposed ***inter alia*** as follows:

> *"14. I then personally took a team of Customs officers on the same day and proceeded to the Applicant's place of business named Xtra House,*

where I showed the Applicant a Writ of Assistance . . . which I said I was going to read to him, but he said it was not necessary because he already knew its contents, and I requested to search his premises for the 12 computer sets, and he gave permission."

11. The Applicant however deposed in an additional affidavit of 29 May 2002, among other things, as follows:

> *"2. Three Customs Officers . . . came to my shop on April 10th 2002. I was called from my house on Amara Avenue and when I met them at the shop Angel Cocom read a writ of assistance to me. Before he did so he told me they were there to search my premises for the computers I had imported on 3rd April 2002. I understood premises to include my shop, house and warehouse.*
>
> *3. After reading the writ, it appeared to me that they had authority to enter and search my premises and could use force to break down my doors if I resisted.*
>
> *4. As a consequence I could not object to the search and volunteered to take the officers to my house . . .*
>
> *7. Cocom came back into the shop a few minutes later and this time Recinos and about four other officers came with him.*
>
> *8. Recinos had a writ of assistance and started to read it. I told him I was already aware of it . . ."*

12. From this, I find that the Customs officers gained entry to the Applicant's premises under the colour of and on the strength of the Writ of Assistance, whose format I produce here as follows:

"BELIZE

WRIT OF ASSISTANCE

ELIZABETH II, by the Grace of God, Queen of Belize.
TO THE COMPTROLLER OF CUSTOMS AND ALL OTHER OFFICERS OF CUSTOM IN THE COUNTRY OF BELIZE:-

We hereby authorize you or either of you, in the said Country, having this writ to enter into any house, shop, cellar, warehouse, room or other place in the said Country and there to search for, seize and thence to bring any uncustomed, forfeited or prohibited goods and to put the same in the Queen's Warehouse, and you are hereby authorized in case of resistance to break open doors, chests, trunks and other packages and to all such things as are authorized to be done by the Customs Regulation Act, Chapter 49 of the Laws of Belize, Revised Edition, 2000.

WITNESS The Honourable Abdulai O. Conteh, Esquire, Chief Justice of Belize, the 12th day of February, 2001.

A. O. Conteh

ABDULAI O. CONTEH
CHIEF JUSTICE"

13. I do not therefore accept the submission of the learned Solicitor General that the Customs officers were licensees on the Applicant's premises: they entered these premises on the authority of the Writ of Assistance, leaving the Applicant precious little choice in the matter.

14. From this bare recital of the material facts surrounding this application, two principal issues are thrown up for determination. And it is on these two issues that both learned attorneys Mr. Dean Barrow S.C. for the Applicant and Mr. Elson Kaseke, the Solicitor General for the Respondent, have pinned their colours to the mast and have urged upon me the respective position of their clients.

15. The Applicant complains that his constitutional rights as provided for in **sections 9, 14 and 17 of the Constitution** of Belize have been contravened by the Comptroller of Customs by:

1) the wrongful collection and retention of excess duty and an excess deposit with respect to goods imported by him and

2) the wrongful entry, unlawful search and seizure by agents and servants in the Customs Department of the Applicant's premises twice on 10th April 2002 and the illegal seizure and carrying away and detention of 12 computer systems and thirty-three bags of rice

16. The issues may briefly be stated thus:

i) Was the entry of the Applicant's premises and the search and the seizure of articles thereon by the Customs Officers under the authority of the Writ of Assistance lawful?

ii) Was the demand and receipt of $90,000.00 as deposit by the Customs in order for the Applicant to clear his goods lawful?

17. The Applicant has invoked **sections 9, 14 and 17 of the Constitution** as the platform to assail these actions by the Customs agents. It is however, safe in the circumstances of this case, to say that there is a good deal of overlap between **sections 9 and 14** for the following reason: the protection of privacy guaranteed by **section 14** would include the right to be free from search, comprehended in the proscription against unlawful interference with an individual's home and the requirement to respect the home of every person. I shall therefore for the determination of the first issue focus in this judgment, on **section 9** instead. This, of course, is not to say that **sections 9 and 14** are one and the same. They are not, but from the facts of this case, I will assume that the prohibition of unlawful interference with a person's home and the duty to respect the home of every person are subsumed in the protection against arbitrary search or entry so clearly posited in **section 9(1)**. **Subsection (2)** of **section 14** is also **pari materia** with **subsection (2) of section 9**; and the former expressly refers to the latter. I shall now turn to the first issue, that is, was

the entry and search of the Applicant's premises on the authority of the Writ of Assistance lawful?

18. **1. THE WRIT OF ASSISTANCE**

I have set out above the format and contents of the Writ of Assistance. The writ itself is provided for in **section 87** of the **Customs Regulation Act – Chapter 49 of the Laws of Belize, Revised Edition 2000.** This Act became operational in Belize on 25 July 1878, although **section 87** itself was only brought into effect by Act No. 40 of 1963. This section provides:

> "*87. It shall be lawful for any officer of customs or any person acting under the direction of the Minister having a writ of assistance under the hand of a judge of the Supreme Court and the seal of the Supreme Court, or any warrant issued by a magistrate, with or without a police officer or other peace officer, or for the Comptroller without such writ of assistance, to enter into and search any house, shop, cellar, warehouse, room or other place and, in case of resistance, to break open doors, chests, trunks and other packages, there to seize and thence to bring any uncustomed, forfeited or prohibited goods, and to put and secure them in the Queen's warehouse."*

And **section 88** provides:

> *"88. All writs of assistance issued under section 87 shall continue and be in force during the whole of the reign in which such writs are granted and issued, and for six months from the conclusion of such reign."*

19. It is therefore evident that from its provenance, format and contents, the Writ of Assistance is a colonial and pre-independence enactment.

20. On 21 September 1981, Belize became independent with a written Constitution which, among other things, provided in **Chapter II**, for a wide range of **Protection of Fundamental Rights and Freedoms**. **Section 2** of the Constitution declares thus:

"2. This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

21. **Section 9 of the Constitution** guaranteeing protection from arbitrary search and entry provides:

"9(1) Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry of others on his premises."

22. In reliance on this negative formulation of this right, the learned Solicitor General submitted that this exception is applicable in this case as the Applicant volunteered to take Customs Officers to his house to look at a computer he had there and that on the second occasion, the Applicant consented to the search of his business premises at Xtra House, and even led the officers to the second floor of Xtra House where the computers were located. Consequently, the learned Solicitor General submitted, that the Customs Officers had a licence, express and/or implied to be at the Applicant's business and residential premises in search of the computers. The thrust of this submission is that the Applicant consented to the search, therefore his constitutional rights were not infringed.

23. But as I have found on the evidence and stated above, the Customs Officers entered the Applicant's premises with the aid of the Writ of Assistance they had in their possession and was shown and read to the Applicant. They could not therefore have been licensees, express or implied, they were on the Applicant's property on the strength of the writ. The surrounding circumstances showed that they were not licensees.

24. However, the protection from arbitrary search or entry is not absolute. The Constitution and indeed the general law recognizes exceptions to this right; and **subsection (2) of section 9** like **subsection (2) of section 14**, expressly recognizes this and provides as follows:

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent ***that the law in question makes reasonable provision***." (emphasis added and I shall return to this later).

The subsection then goes on, in **paragraphs a – d**, to enumerate when in a given case, a particular law ostensibly derogating from the protection against arbitrary search or entry shall not be held to be inconsistent with or in contravention of this **section 9** protection.

25. The learned Solicitor General has therefore laid much store on **paragraph (c) of subsection (2) of section 9 of the Constitution** which is to the effect that anything contained in or done under the authority of any law shall not be held to be inconsistent with or in contravention of the protection against arbitrary search or entry to the extent that the law in question makes reasonable provision:

> *"(c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or dues or in order to carry out work connected with any property that is lawfully on those premises and that belong to the Government or to that authority or body corporate, as the case may be."*

26. Therefore, the Solicitor General submitted, the search of the Applicant's premises was valid within **section 9** as it was conducted by the Customs Officers on the strength of a Writ of Assistance issued by this honourable Court. He however, submitted that the central question for determination on this score was whether **section 87 of the Customs Regulation Act** under which the Writ of Assistance was issued was constitutional or not. He had no doubt that the Writ, and therefore the search conducted under it, was lawful because it was authorized by **section 87 of the Customs Regulation Act**: this he submitted therefore, brought it within the parameters of **paragraph (c) of subsection (2) of section 9 of the Constitution**.

27. After some deep and anxious reflections I must say that I have great difficulties in accepting the learned Solicitor General's submissions contending for the validity and use of the Writ of Assistance. My difficulties stem principally from the provisions of **section 87**, nature and format of the writ, which it authorizes. I do not think they meet the Constitution's requirement of **"reasonable provision"** to be within the parameters of **subsection (2) of section 9**. Much reliance was put by

the Solicitor General on the case of **Attorney General v Williams and Another (1997) 3 L.R.C. 22**, where similar problems connected with executing a search and seizure on the premises of the respondent were encountered in the context of section 203 of the Jamaican Customs Act. Lord Hoffman, in delivering the opinion of the Board of the Privy Council, provided a salutary reminder at the start of the judgment of the old case of **Entick v Carrington (1765) 2 Wils 275**, a familiar chestnut in this area of constitutional law and human rights. In that case the King's Messengers entered the plaintiff's house and seized his papers under a warrant issued by the Secretary of State, a government Minister, and he quoted the statement of Lord Camden CJ at p. 291 to this effect:

> *"Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does, he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law . . . we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have."*

28. **The Attorney General v Williams and Another supra**, was concerned with the power of search contained in section 203 of the Jamaican Customs Act, as I have earlier mentioned. This section provided:

> *"If any officer shall have reasonable cause to suspect that any uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, are harboured, kept or concealed in any house or other place in the Island,* ***and it shall be made to appear by information on oath before any Resident Magistrate or Justice in the Island, it shall be lawful for such Resident Magistrate or Justice by special warrant under his hand to authorise such officer to enter and search such house or other place,*** *by day or by night, and to seize and carry away any such uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, as may be found therein; and it shall be lawful for such officer, in case of resistance, to break open any door, and to force and remove any other impediment or*

obstruction to such entry, search or seizure as aforesaid." (emphasis added)

29. Lord Hoffman, after extensive quotations from the judgment of the House of Lords in **IRC and Another v Rossminster Ltd (1980) 1 All ER 80**, stated at pp. 30 – 31:

> *". . . if the constitutional safeguards are to have any meaning it is essential for the justice conscientiously to ask himself whether on the information given upon oath (in the case of section 203 either orally or in writing) he is satisfied that the officer's suspicion is based upon reasonable cause."*

The Board had earlier explained the purpose of the requirement that a warrant be issued by a justice as being *"to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or other executive officer of the state to enter upon a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This duty is of high constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met."*

30. Of course, it is a **Writ of Assistance** that is in issue in this case before me and not a warrant. But I do not think this make any material difference for as Lord Wilberforce said in **R v IRC, ex parte Rossminster Ltd supra**, at p. 84:

> *"There is no mystery about the word "warrant": it simply means a document issued by a person in authority . . . authorising the doing of an act which would otherwise be illegal."*

Therefore, in my view, the quaint, if grand appellation, "Writ of Assistance", makes no difference, it is in form and in effect a warrant. The pertinent issue for inquiry here therefore, is the issue of validity.

31. As Margaret Demerieux, correctly in my respectful opinion, observed in her book, **Fundamental Rights in Commonwealth Caribbean**

Constitutions (Faculty of Law Library, University of the West Indies, 1992) at p. 310:

> *". . . there is the issue of validity of the search warrant itself. As pointed out by Lord Diplock in IRC v Rossminster, the point at issue in cases such as Entick v Carrington was not merely the generality of the warrants but of lawful authority to issue warrants in the first place. As in the United Kingdom, a variety of West Indian statutes authorise search on the issue of a warrant and* ***normally require a showing, to the issuing authority, of the existence of reasonable grounds. This should now be a constitutional requirement***.
>
> *. . . the establishment of reasonable grounds before the issuing authority itself, has implications for the task involved in granting the warrant. In Southam (11 D.L.R. (4th) 641), it was strongly affirmed that the task involved was a judicial one to be carried out by an impartial and independent person capable of acting judicially, demanding in principle, a separation of the administrative or investigative function, from the judicial."* (emphasis added)

32. It is in the light of all of this that I am of the settled conviction that if the promise and prospect, indeed the guarantee of protection from arbitrary search and seizure and privacy provided for in the Constitution is to mean anything, the quaint **Writ of Assistance** which itself, as I pointed out earlier in this judgment, pre-dates the Constitution, should and must be rationalized and brought in line with the Constitution's provisions, spirit and intendment. I say quaint, because its very language, speaks to a bygone era: it opens with the invocation *"Elizabeth II, by the Grace of God, Queen of Belize, To the Comptroller of Customs and all other officers of Customs in the Country of Belize: We hereby authorize you or either of you, in the said country having this writ to enter into any house, shop, cellar . . ." etc. etc.*

33. The writ, as it stands, is a peremptory and prior authorization to enter people's houses, search and seize uncustomed, forfeited or prohibited goods, and is witnessed by no less than the Chief Justice. Other than this, it contains no procedure or system that regulates its use or deployment. Yes, Her Majesty Queen Elizabeth II is the head of State in and for Belize, but I am not sure that Her Majesty would be happy or amused to know that in her name, ordinary Belizean homes can be searched and goods seized therefrom, without anyone being first satisfied

that there was reasonable cause to execute the search in the first place. Just being armed with the writ, it is said, is sufficient. This, in my view, must be alarming and it makes an odd bedfellow with the Constitution's protection, and sits uncomfortably with it. Far from operating as a **deux ex machina** in the colorful phraseology of Mr. Barrow for the Applicant; on the contrary, in my view, the writ operates to kill the Constitution's protection against arbitrary searches, this cannot be beneficial or good.

34. This case glaringly shows the need to rationalize the process, by providing a procedure and system that would regulate the use of the Writ of Assistance. Such a procedure would, for example, provide that before the writ is issued, a judicial officer, say, a Justice of the Peace, or a Magistrate, possibly even a justice of the Supreme Court, is satisfied for probable cause attested to on oath by the requesting officer. Indeed, in **Rossminster supra**, Lord Dilhorne was of the view that the power to authorize administrative searches and seizure should be given to a more senior judge. He said at p. 87:

> *"As the requirement that a judge should be so satisfied is the final safeguard against abuse of the power given by the section (to enter, search and seize documents, files etc. in case of suspected tax fraud), it might be preferable to place the responsibility of their exercise on a more senior judge."*

35. It must be noted that the law in question authorizing entry, search and seizure whether in section 203 of the Jamaican Customs Act (which I have mentioned earlier) or section 20C of The United Kingdom Tax Management Act 1970 considered respectively in **Williams supra** and **Rossminster supra**, all require an appropriate judicial officer being satisfied on information on oath given by an officer before the relevant warrant authorizing the entry and search could first be issued.

36. This, I dare say, is in stark contrast to the Writ of Assistance here in Belize. This cannot be right or reasonable. For to leave the Writ in its present form, its issue or use unregulated or unsupervised, may well make it a battering ram against the liberties of Belizeans, in particular, against their constitutional rights to be free from unreasonable searches of their homes.

37. To be sure, the Constitution in **section 9(2)(c)** would have in contemplation the use of a warrant or the Writ of Assistance under the

Customs Regulation Act (sections 87 and 88 as a law that authorizes what the writ seeks to do. But, and this, in my view, is crucial, *". . . to the extent that the law in question makes reasonable provision."* There is no provision that can realistically be called **reasonable** in the issuance of the Writ of Assistance. As they stand **section 87 and 88** of the **Customs Regulation Act**, which I have produced earlier, do not in any way require an objective or independent assessment of the conditions or information before the writ issues. **Section 87** itself contains no safeguards, or reasonable provision for the issuance of the writ. The only trigger to deploy the writ is a ministerial direction. This I am constrained to say is not the same as an independent and impartial oversight of the process of authorization to issue, which all the authorities, both Commonwealth Caribbean **(the Williams case supra)** and United Kingdom **(Rossminster, supra)** recognize as necessary. In my view, both **section 87** and the format and content of the Writ of Assistance make the latter self-evident as a pre-prepared warrant, to enter and search people's homes and premises, well before any infraction is suspected or has in fact been committed. Together therefore, they hang as a brooding presence over the protection the constitutional guarantee of protection against arbitrary search and seizure. They represent a prior authorization to enter, search and seize, without regard to time or circumstance, and indifferent even to the presence or absence of belief that an offence against the Customs regime has been committed. This cannot be reasonable especially in the face of the Constitution's guarantee. To derogate from this guarantee must be for cause, and this cause even if only **prima facie**, must be stated **before** the issue of the writ. This I think, is the meaning and sprit behind **section 9(2)** of the Constitution referring **"to the extent that the law in question makes reasonable provision."**

38. This absence of reasonable provision either in **section 87** or the Writ of Assistance itself, I find, makes it difficult to validate or support the section or the writ in light of the Constitution's provisions. One such reasonable provision could be to require that **before** the writ is issued, a sworn information as to probable cause be laid before a judicial officer such as a Justice of the Peace or a Magistrate. Absent this requirement, it would not be easy to reconcile the writ or **section 87** of the **Customs Regulation** under which it proceeds, with the Constitution.

39. I would therefore hold that in its present form the provisions of **section 87** pursuant to which the Writ of Assistance is issued, offends the Constitution, in particular, **sections 9(2)(c) and 14**.

40. The learned Solicitor General drew my attention to the decision of the Canadian Supreme Court in **R v Hamill (1987) 1 S.C.R. 301**, where the use of a Writ of Assistance in effecting a search instead of warrant was in issue. He however said that this case supports the constitutionality of the Writ of Assistance. On a closer and careful reading and analysis of this judgment, I do not think it bears out the learned Solicitor General's submission. It is clear from the judgment that the validity of a Writ of Assistance had been the subject of challenges under the Canadian **Charter of Rights and Freedoms**. And it would seem that provisions of the Canadian Narcotic Control Act in so far as they relate to Writs of Assistance, have since 1985 been repealed. Lamer J. in delivering the judgment of the court on this issue stated:

> *"Section 10(1)(a) of the Narcotic Control Act authorizes the search of a dwelling house only when the peace officer has a writ of assistance issued under s.10(3) or a search warrant issued under s.10(2). The appellant has challenged writs of assistance as inadequate under ss.7 and 8 of the Charter on the ground that there is no prior judicial authorization for the search. The Crown in its factum states that it does not intend to uphold the validity of s. 10(1)(a) and s.10(3) in so far as they relate to writs of assistance, and those provisions have since been repealed (S.C. 1985 c.19 s. 200). It is thus no longer necessary to answer the constitutional question stated by the Chief Justice relating to the constitutionality of those provisions. However, for the purposes of this appeal* ***"we should assume that writs of assistance are constitutionally inadequate for the search of a dwelling-house*** *under s.10(1)(a). As a result, because the police officers did not have a search warrant, we must conclude that the search was unreasonable."* (emphasis added)

41. I have pointed out earlier that the Writ of Assistance provided for in **sections 87 and 88** of the Customs Regulation Act is a pre-independence enactment. This does not mean that at independence all colonial legislation were swept overboard. This would have been impracticable. The fact remains however that some colonial legislation did pose

challenges to the enjoyment of the full panoply of fundamental rights introduced by independent constitutions. Perhaps uniquely in Commonwealth Caribbean, Belize has in **section 21** of the Constitution what is best described as a sunset clause in relation to the operation and effect of pre-independence legislation that would derogate from fundamental human rights guaranteed in Chapter II of the Constitution. **Section 21** provides that for a **period of five years after independence** nothing contained in any law before independence nor anything done under the authority of any such law shall be held inconsistent with or done in contravention of any of the fundamental rights provisions of Chapter II.

But, the sun as it were, had set on 1986 in such protection of pre-independence laws that might be derogative of the fundamental provisions of the Constitution. Indeed, **section 134(1)** of the Constitution provides:

> *"134(1) Subject to the provisions of this Chapter, the existing laws shall, notwithstanding the revocation of the Letters Patent and the Constitution Ordinance, continue in force on and after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."*

42. This means surely that even if the Writ of Assistance was valid during the colonial administration and in so far as it authorizes search of premises without prior judicial authorization, valid for five years after independence, it is now necessary to construe it with such modifications, adaptations, qualifications and exceptions as may be necessary to bring **sections 87 and 88** of the **Customs Regulation Act** into conformity with the Constitution.

43. One such modification or qualification in order to give meaning and life to **section 9** and to make for reasonable provisions for the issuance of the Writ of Assistance, is to require that some information, sufficient to satisfy him be laid before a judicial officer, who shall then authorize the issue of the writ. In this regard, **section 2 of the Constitution** which I reproduced earlier, stands as an ever watchful sentinel to ensure that **no** law derogates from its provisions. I will therefore read this requirement as necessary into **section 17** of the **Customs Regulation Act**. See **San Jose Farmers' Coop. Soc. Ltd. v Attorney General, 3 BLR 1**, where

the Court of Appeal explained the power of a Court to make modification in an Act in order to bring it into conformity with the Constitution.

44. From the facts of this case on the issue under consideration here, it is manifestly clear that the Applicant cleared the computers from Customs not by a bill of sight, but in fact by an uplift in the duty he had to pay on them. Entry of goods by bill of sights occurs where an importer of any goods is unable, for want of full information, to make immediately a perfect entry of the goods. In such a case, the importer may on making a signed declaration to that effect before the proper officer, deliver to the latter an entry of the goods by a bill of sight.

In the instant case, the Applicant having paid an uplift on the duty, that is additional duty, on the computers, cleared them and took them away. If, as is contended for by the Respondent, that a later audit revealed that in fact more duty should have still been paid on the computers, there are ample and clear provisions under the provisions of the **Customs Regulation Act** for the additional duties to have been assessed and collected. **Section 116** provide:

> *"Where it comes to the knowledge of the Comptroller that any person liable to pay customs duties on any goods has not been assessed at an amount less than that which ought to have been charged, the Comptroller may within three years of his becoming so aware, assess such person at such amount or additional amount, as according to his best judgment ought to have been charged, and the provision of this Act as to notice of assessment, appeal and other proceedings under this Act shall apply to such assessment or additional assessment."*

45. There was therefore no need to have had recourse to the Writ of Assistance in this case. The computers were not uncustomed goods – the duties paid on them might have been under-assessed. I do not agree with the learned Solicitor General that *"other proceedings"* in **section 116** includes the recourse to and use of the Writ of Assistance. The use of this writ in the circumstances of this case I find, violated the Applicant's constitutional rights.

46. Apocryphally, it is the ancient Writ of Assistance against which the American colonists revolted that led to the Boston Tea Party that heralded the American Revolution in 1776 that gave birth to the modern day U.S.A. (see **Black's Law Dictionary 7th ed. (West Group 1999)** at p. 1603).

47. It is therefore no surprise that the Fourth Amendment to the U.S. Constitution puts beyond doubt the issue when it states:

> *"The right of the people to be secure in their persons papers and effects against searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or thing to be seized."*

48. **Section 9(1)** of the Constitution of Belize may not be so explicit and expressly demanding or strident on probable cause supported by oath or affirmation to justify the issue of a warrant to effect a search, but it can hardly be doubted that to give meaning and life to the proscription against searches, they can only be justified or warranted for cause, probable or reasonable, which must be so stated to the issuer of the warrant: otherwise the protection afforded would be emptied of content. I think it is only reasonable to require that some cause be shown or stated **before** authorization to enter and search is given.

Subsection (2) of **section 9** I think contemplates some check on a law such as is provided for in its **paragraph (c)** that may authorize entry and search by stating that that law must make **reasonable provision** for the authorization. I find none in **section 87** of the **Customs Regulation Act**, nor in the Writ of Assistance itself.

49. Finally, on the issue of the Writ of Assistance in this case, I must confess to some personal embarrassment here. The Writ of Assistance which is challenged in these proceedings was signed by me as a witness in my capacity as Chief Justice. My embarrassment is assuaged somewhat however by the fact that the provisions authorizing the Writ state that it shall be in force during the whole of the reign in which it was issued and for six months after the conclusion of such reign. Her Majesty Queen Elizabeth II is still on the throne to which she ascended in 1952.

This presupposes that there must have been a previous Writ or Writs of Assistance. That a new writ was thought necessary only two years from her Golden Jubilee and because of the revision of the laws of Belize, shows the certain misunderstanding that surrounds this instrument, and therefore the need to rationalize it. For example, I attested to the writ on 21st February 2001, but it was only utilized on 10th April 2002, over a year later. This shows I think, on the date it was issued, that there was no allegation or suspicion of infraction against the Applicant.

My discomfiture as a witness to the Writ notwithstanding however, it is the duty of this Court to determine whether the Writ in its present form is valid and proper given the provisions of the Constitution.

50. For all the reasons I have given above, I find that the entry and search and seizure of the twelve computers and the thirty-three sacks of rice by agents of the Customs authority were impermissible.

51. I mentioned earlier that the Director of Public Prosecutions also swore to an affidavit in this matter. Having read the affidavit carefully, I am convinced that it is no more than an **ex post facto** attempt to blunt and possibly negate the consequences of the illegal search of the Applicant's premises and seizure therefrom of the computers and sacks of rice. From the contents and tenor of this affidavit, I am left with the distinct impression that the prospect of criminal prosecution of the Applicant averred to in the affidavit, is being held **in terroren** over his head for launching his constitutional challenge against the actions of the Customs officers. I can only say that it would be a sorry day for the civil rights, liberties and fundamental right of everyone in Belize, if recourse to the Courts for their vindication were to be visited with criminal prosecution, especially where such prosecution or the prospect of it comes as an after thought. In this case, it would appear that the specter of prosecution only materialized **after** the Appellant launched his Constitutional motion for redress on 2nd May 2002 waiting to exact retribution. I need say no more.

52. **2. THE DEPOSIT OF $90,000.00 AND PAYMENT OF ADDITIONAL DUTY**

I now turn to consider the other issue in this case, namely, the demand and receipt of **$90,000.00** deposit and the payment of duty as assessed by Customs, which the Applicant calls excess duty.

53. The Applicant has complained that because he had to deposit **$90,000.00** with the Customs before he could clear his goods and the collection of extra or excess duty by the Customs, this infringed his constitutional right guaranteed in **section 17** of the **Constitution**.

54. The protective provision against the deprivation of property is stated thus in the Constitution:

> *"17(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any*

description shall be compulsorily acquired except by or under that -

(a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of -

(i) establishing his interest or right (if any);

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;

(iii) determining the amount of the compensation to which he may be entitled; and

(iv) *enforcing his right to any such compensation*."

55. However, **subsection 2** of **section 17** clearly shows that the right to protection from deprivation of property is not absolute: it provides as follows:

"(2) Nothing in this section shall invalidate any law by reason only that it provides for the taking possession of any property or the acquisition of any interest in or right over property . . ."

and it goes on to enumerate therein instances in **paragraphs a - m** where the taking or deprivation of property under a particular law shall not be taken as offending the protection afforded in **section 17**.

56. The protection offered is against the deprivation or acquisition of property in the generic sense, not in accordance with the agreement, consent or will of the owner.

57. On the issue under consideration here, the Applicant contends that because he was required to deposit **$90,000.00** before he could clear his imported goods from Customs, this was an infringement of his rights under **section 17** as well as the wrongful collection and retention of excess duty in respect of the said goods from him by the Customs authorities.

58. The Applicant himself deposes **inter alia** in his Affidavit dated 30 April 2002 in support of his Motion for redress as follows:

> *"2. On 10th July 2001, I submitted an Entry to Customs in relation to goods I was importing for Xtra House. Because of a dispute as to value and the need for me to produce documentation./verification of the values I assigned to the goods, I was approved by Everard Lopez, then Assistant Comptroller now the Acting Comptroller of Customs, to pass a Provisional Entry.*
>
> *3. Mr. Lopez had estimated the duties on the goods at $53,470.45 as opposed to my estimate of $29,220.45. In approving the Provisional Entry so that I might take possession of the goods, which were largely perishables, Mr. Lopez required me to pay a deposit of $90,000.00, or $36,529.55 in excess of the actual amount of the duty he had estimated. I say that such a requirement, and the collection from me of the said excess, is unconstitutional and violates my right under Section 17 of the Constitution not to be illegally deprived of my property.*
>
> *4. On August 30th of 2001 after I had submitted various arguments to the Customs Valuation Department and verification in support of the values I had claimed for the goods, I attempted to perfect the Provisional Entry. Among the things I had shown to Valuation,*

were the fact that my brands were generic, of short shelf life, were rejected orders from other countries, and the prices on the website of my suppliers confirming what I had paid. Notwithstanding this, Mr. Lopez rejected my Adjusting Entry of August 30th 2001, and insisted on his original estimate of duties.

5. After this my then Attorney and I held discussions with Mr. Lopez and were told to produce an actual letter from my suppliers verifying the prices I had paid. I obtained such a letter and submitted it, but Customs continued to stall me saying that the Department and Mr. Lopez were 'working' on the matter. This situation continued until February of 2002 when Valuation told me the ***original*** *Lopez figure of $53,570.45 as duty was final, and returned my Entry to the Accounts Section. I have no yet received the excess of the deposit over the assessed duty of $53,470.45 and an still maintaining that that assessment of duty, in the face of the evidence I submitted, is irrational, and improper."*

59. In answer to the Applicant, Mr. Lopez, the Acting Comptroller of Customs, swore to an Affidavit dated 24 May 2002. The material parts of this affidavit I had earlier reproduced in this judgment at paragraph 8 above.

60. Mr. Barrow for the Applicant, relying principally on the decision of the Court of Appeal of the Organization of Eastern Caribbean States in the Dominican case of **J. Astaphan & Co (1970) Ltd. v Comptroller of Customs and Another (1999) 2 L.R.C. 569**, urged on me to find and hold that the provision *". . . and in addition thereto such sum as the Comptroller may require not being less than the amount deposited as the estimated duties"* in section 24 is unconstitutional. He submitted that this was in **pari materia** with section 27 of the Dominican Customs (Control and Management) Act, which was struck down by their Court of Appeal. He therefore submitted further that what the Comptroller did here was invalid and that the excess over the estimated duty required as a deposit from the Applicant amounted to wrongful deprivation of his property contrary to **section 17** of the **Constitution**.

61. In **Astaphan supra**, the appellant, during 1991 and 1992, imported vehicular spare parts in five separate consignments. At the time of the

arrival of each consignment the appellant had not received the invoice and other shipping documents and was therefore unable to make perfect entries of the goods. Since the appellant was anxious to clear the goods from Customs he paid the Comptroller of Customs or the proper officer sums of money pursuant to section 27 exceeding the estimated duties on the goods by or in aggregate $81,824.40. In September 1992, the appellant's accountants requested the Comptroller of Customs to refund the sum of $80,624.61 as amounts due in respect of deposits paid between April 1991 and July 1992. The Comptroller rejected those claims on the ground that no perfect entry of the goods had been made within the three-month period.

62. The demand for the payment of the excess was made under section 27 of the Dominican Customs Act which provided as follows:

> *"(1) Without prejudice to section 26, where on the importation of any goods the importer is unable for want of any document or information to make perfect entry of those goods, he shall make a signed declaration to that effect to the proper officer.*

(2) Where a declaration under subsection (1) is made to the proper officer, he shall permit the importer to examine the goods imported.

(3) Where an importer has made a declaration under subsection (1), and submits to the proper officer an entry, not being a perfect entry, in such from and manner and containing such particulars as the Comptroller may direct, and the proper officer is satisfied that the description of the goods for tariff and statistical purposes is correct, and in the case of goods liable to duty according to number, weight, measurement or strength that number, weight, measurement or strength is correct, the proper officer shall, on payment to him of the specified sum, accept that entry as an entry by bill of sight and allow the goods to be delivered for home use.

(4) For the purposes of subsection (3), the specified sum shall be an amount estimated by the proper officer to be the duty payable on such goods, together with such further sum as the proper officer may require, that further sum being not less than one half of the estimated duty.

(5) If, within three months from the date of making an entry by bill of sight under subsection (3), or such longer time as the Comptroller may in any case permit, the importer makes a perfect entry, and that perfect entry shows the amount of duty

(a) to be less than the specified sum, the Comptroller shall pay the difference to the importer, or

(b) to be more than the specified sum, the importer shall pay the difference to the Comptroller.

(6) Where no perfect entry is made within the time limit laid down by subsection (5), the specified sum paid shall be deemed to be the amount of duty payable on the importation of the goods.

(7) *Notwithstanding any other provision of this section, where, at any time after importation of goods, the Comptroller is satisfied that in respect of such goods it is impossible for the importer to make perfect*

entry in respect of those goods, the Comptroller may, subject to such conditions and restrictions as he may see fit to impose, permit the goods to be entered at a value which is, in his opinion, the correct value of the goods, and the entry shall be deemed to be a perfect entry."

63. On appeal from a dismissal of its motion that subsections (3), (4) and (6) of the Act violates its constitutional right to property, the Court of Appeal held on this issue that the State's compulsory exaction of money from the individual is a compulsory acquisition of the individual's property within the meaning and intent of the Constitution's protection of the right to property (section 6 in the Constitution of the Commonwealth of Dominica) but that if the compulsory exaction or acquisition is by way of a penalty, it is validated by section 6(6)(a)(ii) and could not be held to be inconsistent with or in contravention of section 6. But the compulsory exaction or acquisition of money from an individual could not be said to be by way of penalty unless the individual was in breach of the law. The Court said that the appellant had not committed any breach of the law. Section 27 did not provide that an importer committed an offence if he is *"unable for want of any document or information to make a perfect entry"* of imported goods. Accordingly, the further sum was not a penalty and was therefore not caught or protected by section 6(6)(a)(ii) of the Constitution. The Court concluded that the compulsory exaction or acquisition from the appellant of the further sum of $80,264.61 contravened section 6 of the Constitution and was consequently invalid.

64. Mr. Barrow has pitched his tent as it were, on this decision, and has forcefully urged on me to find that the applicant's property rights were violated when he was required to deposit **$90,000.00** in order to clear his goods in the absence of a perfect entry in respect of those goods.

65. The Solicitor General, with some gusto, has resisted Mr. Barrow's contentions and submissions. He submitted that the facts that gave rise to the Applicant's case are distinguishable from **Astaphan's case supra** and that I should in the circumstances uphold the Comptroller of Customs' action in the light of the relevant provisions of the **Customs Regulation Act**.

66. For a resolution of the issue under consideration here, it would be pertinent to reproduce these sections which are **sections 23, 24 and 25** of the Act. They provide as follows:

"23(1) If the importer of any goods or his known agent makes or subscribes a declaration before the Comptroller or other proper officer that he cannot for want of full information make perfect entry thereof, the Comptroller or other proper officer may receive an entry by bill of sight in such form as the Comptroller may from time to time prescribe for the packages of such goods, by the best description which can be given.

(2) Such entry, being signed by the Comptroller or other proper officer, shall be the warrant for provisionally landing such goods to be examined by such importer in the presence of the proper officer, and within three days after the goods are so landed, or within such further time as the Comptroller sees fit after landing thereof, the importer shall make a perfect entry thereof.

24. Where an entry for the ***landing and examination of goods for delivery on payment of duty is made by bill of sight, such goods shall not be delivered until perfect entry thereof is made and the duties due thereon paid, unless the importer deposits with the Comptroller a sum of money sufficient in amount to cover the estimated duties*** *payable thereon* ***and in addition thereto such sum as the Comptroller may require not being less than the amount deposited as the estimated duties***.

Provided that the Comptroller may, in his discretion, accept a bond in lieu of a cash deposit to secure the additional sum (but not the estimated duties) payable under this section, such bond being conditioned on the making of perfect entry of goods within the specified time and the payment of all duties thereon.

25. The sum deposited as the estimated duties under section 24 shall be brought to account as duty and ***the additional sum deposited or secured by a bond shall be forfeited and paid into the***

Consolidated Revenue Fund unless the importer produces to the Comptroller, within three months or such further period as the Comptroller may in any special circumstances allow, satisfactory evidence of the value, and makes perfect entry of such goods*, in which case* ***so much of the sums deposited as is necessary shall be brought to account as duty*** *and the balance returned to the person who deposited the same." (*emphasis added)

67. I believe these provisions, in essence, underscore the routine daily operations of the Customs Department in their interaction with the importing public. Their operational features, I believe, can be stated as follows:

> *"1. An importer imports goods into the country.*
>
> *2. But for some reason, he or his agent cannot, for want of full information on the goods, make a perfect entry to clear them. This may be due to a number of factors, such as the late or non-delivery of the invoice for the goods or even the bill of lading. Perfect entry is not defined, but its particulars are stated in* ***section 17*** *of the Act. The duty finally payable on the goods is determined by the particulars in the entry for them.*
>
> *3. In the absence of perfect entry of the goods, the Comptroller or some proper officer may receive a bill of sight which is a description of the goods in a form prescribed by the Comptroller.*
>
> *4. This then allows for the provisional landing of the goods after the bill of sight is signed by the Comptroller or other officer. This enables the importer to examine the goods; he must, if he wants to clear the goods, make a perfect entry for them within three days. That is, give all particulars required by* ***section 17****.*
>
> *5. Goods entered by bill of sight will not be delivered to the importer. However, if the importer wants to take delivery, he must deposit with*

the Comptroller a sum of money sufficient to meet the estimated duty payable plus an additional sum which is not less than that deposited as the estimated duty. The estimated duty is arrived at on the declaration of the importer on the bill of sight. The actual duty exigible can only be known when a perfect entry is made.

*6. To secure the release of the goods pending the making of a perfect entry, the importer deposits the estimated duty **plus** an additional sum which is not less than the estimated duty. This additional sum may, at the discretion of the Comptroller, be given by bond instead of cash deposit. Entry of goods on these terms is what is referred to as 'provisional entry'.*

7. These deposits, that is, the estimated duty and the additional sum serve as an earnest to ensure that when a perfect entry is eventually made, there would be sufficient money in the hands of the Customs authorities to meet the actual duty payable on the goods, because the goods would have, in the meantime, been released to the importer. Any balance remaining from the deposits, that is the estimated duty and the additional sum, is paid back to the importer."

68. From this analysis it would appear to me that the requirement to pay either by cash or bond, an additional deposit to that **estimated** as the duty on the goods cannot, with the greatest respect to the decision in the **Astaphan case** as submitted by Mr. Barrow, be unconstitutional or compulsory exaction or acquisition of the Applicant's property. Although seemingly analogous, section 27 of the Dominican Customs Act is not exactly the same as the provisions in the **Customs Regulation Act** of Belize. In the first place, it is differently arranged but more importantly, it is clear from the latter that the deposit of both the **estimated** duty, in the absence of a perfect entry, and the additional sum, are just that, namely, a **deposit**. Neither would be required if there is a **perfect entry**, all the importer does in that case is pay the duties assessed on his goods and take them away. But in the absence of a perfect entry (full particulars of the goods including their value and invoice etc.) and the desire or anxiety of the importer to get his goods sooner, he is required to pay by way of a deposit both the estimated duty and the additional sum. This cannot be an unconstitutional taking that the importer need not pay either the

estimated duty or the additional sum. He can make a perfect entry and simply pay the duties exigible on his imported goods.

69. The deposit of both the estimated duty and the additional sum is, to my mind, clearly intended to serve as an **earnest**, that the final duties payable on the goods would be met even after their release in the absence of a perfect entry on a "provisional entry". The additional sum is to ensure that there would, in fact, be sufficient to meet the duties when finally determined. This cannot be an unlawful taking of property.

70. It cannot be overemphasized that the importer need not pay even the **estimated** duty nor the additional sum; what he must pay however, is the duty exigible on his importers. He pays the estimated duty and the additional sum because he is desirous of taking away his goods even before he had made a perfect entry for them: perfect entry of the goods determines their valuation for the purposes of customs duties – **section 17** of the **Customs Regulation Act**.

71. More importantly why I feel unable, with respect, to follow the decision in the **Astaphan case supra** is that on the facts before me here, the Applicant has not been treated like the company was in that case where the Customs authorities refused to pay back the $81,824.40 from the "further sum" which it had to pay to clear its goods by way of a bill of right. Here, the Applicant has been informed by the Customs authorities, that since 11th December 2001, voucher No. 417/01-02, being refund of the sum of $35m522.59 after deducting the final duties from $90,000.00 he had to deposit to clear his goods by way of a bill of sight or provisional entry, was awaiting his collection. He has been told this on several occasions but has not collected the voucher. He cannot complain that he was deprived of his property (see paragraph 8 of Mr. Lopez's affidavit).

72. I am, on this issue, more fortified by the decision of the Guyanese Court of Appeal in **Bata Shoe Co. Guyana Ltd. and Others v Commissioner of Inland Revenue and Attorney General (1976) 24 WIR 172**, that it cannot be unconstitutional for the legislature to enact as a condition precedent to conferring the right to appeal on the taxpayer that he should lodge 2/3 or the whole of the tax in dispute before he appeals from the Commissioner's assessment. See also **Bahamas Entertainment Ltd. v Koll and Others (1996) 1 LRC 45** to the same effect which involved

legislation requiring litigants filing claims in court to pay stamp duty on the value of their claim.

73. It cannot therefore be unreasonable or unconstitutional or a deprivation of property, to require an importer, if in the absence of a perfect entry for his goods, he wants to clear them, to deposit the estimated duty plus an additional sum as security as it were, for the final duties that should be exigible on those goods when a perfect entry is eventually made. The importer has an option to avail and make a perfect entry and pay the duties charged or to pay the estimated duty plus an additional sum in the absence of a perfect entry. He gets for the latter, the indulgence or privilege of clearing his goods sooner and before he submits a perfect entry.

74. With regards to the complaint by the Applicant that the excess duty assessed on his goods in the sum of $24,250.00 despite his proof that the correct duty on his goods was in fact $29,225.45 and not the $54,477.41 which the Customs insisted on collecting, the short answer to this, I think, is to be found in **subsection (5)** of **section 17** which provides:

> *"(5) Notwithstanding anything to the contrary contained in this Act or any other law if it appears to the Comptroller, upon the examination of any goods liable to custom duties, that such goods are not valued according to their true value and that they are properly chargeable with a higher amount of duty than that which has been entered or declared in respect of them, the Comptroller may assess the value of such goods at such amount or additional amount, as according to his best judgment ought to have been given as the true value of such goods, and thereafter determine the rate or amount of duty chargeable on such goods, which amount shall be the duty payable in respect of such goods."*

75. It is clear from this that the valuation of goods for the purposes of Customs duties, is for the Comptroller of Customs. If, however, there is a dispute as to the proper value of duty payable on the goods, the Act, in **section 52**, provides a mechanism and procedure to resolve this. This includes recourse to the Customs Tariff Board and additional recourse to the Supreme Court – see **subsections (5) and 6**. The Applicant, it seems,

has not availed himself of this route. He has chosen instead to come to this Court by way of constitutional challenge.

76. However, in view of my finding on this issue under consideration here, I do not think **section 24** of the **Customs Regulation Act** is unconstitutional nor do I find that its application in the circumstances of the Applicant and his imported goods, constitute an unlawful taking of his property contrary to **section 17** of the **Constitution**. The taking of **$90,000.00** from him or rather requiring him to deposit it before he could clear his goods, was lawful, I find, pursuant to the scheme and provisions in particular, **section 24** of the Act, which, I find, does not offend **section 17** of the **Constitution** and is, on the contrary, validated both by **section 24 of the Act** and **subsection (2) paragraph (a)** of **section 17 of the Constitution**.

77. I find that the request for **$90,000.00** deposit to enable the Applicant to clear his goods and the subtraction therefrom of the original estimated duties and later the final duties exigible and assessed by the Customs authorities fulfilled the very purpose of **section 24** of the **Customs Regulation Act** and is in consonance with **section 17(2)(a)** of the **Constitution**. The deposit fulfilled the purpose for which it was required in the first place, as **an earnest** that having cleared his goods on a provisional entry (an imperfect entry), the Applicant would later pay or meet the correct duties as assessed by the Customs authorities, and that these would be sufficient to meet this extra. Therefore this sum of **$90,000.00** deposit was, I find, reasonably required, both within **section 24** of the Act and **section 17(2)(a)** of the **Constitution** *"in satisfaction of any tax rate or due."*

78. Finally, in view of my findings on the two issues agitated in these proceedings, I am unable to grant the Applicant the Declaration and reliefs he seeks in relation to the deposit collected from him and the extra duty he had to pay in respect of his imported goods. However, I grant the Declaration he seeks in relation to **sections 9 and 14** of the **Constitution**. I find and declare that his rights under these sections were violated by agents of the Customs authorities when they unlawfully searched his premises and removed therefrom twelve Computers and thirty-three sacks of rice.

79. Accordingly, I order that these twelve computers and thirty-three sacks of rice be returned immediately to the Applicant.

80. I am however unable to award, by way of relief, any damages to the Applicant for the loss of business he might have suffered as a result of the seizure of his computers. I am not satisfied or convinced on this score by the averments in the Applicant's affidavit and the exhibits thereto.

81. However, I think the Applicant is undoubtedly entitled to some compensation for the embarrassment and humiliation caused to him by the illegal entry and search of his premises and the removal therefrom of his computers and sacks of rice. For this award the Applicant the sum of $20,000.00.

82. As an important principle of constitutional law was involved in this case, viz, the right of everyone without more not to have their premises entered into and searched and articles removed therefrom with prior authorization for cause to be stated, I think, even though the Applicant did not succeed on the issue of the deposit and extra customs duty, it is reasonably fair that he be awarded his costs in these proceedings.

I will now hear counsel on the quantum of costs.

A. O. CONTEH
Chief Justice

DATED: 29th July, 2002.